

APR 6 1977

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1070

EUGENE L. SMALDONE, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY OF PETITIONER TO
BRIEF IN OPPOSITION

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The Brief for the United States in Opposition is essentially unresponsive to the Petition. Respondent neither defends the actions of the prosecutor at trial, nor attempts to contravert directly Petitioner's showing that the Tenth Circuit in permitting suppression of the Report at issue took an improperly narrow view of the kinds of impeaching evidence which prosecutors must produce under

Brady v. Maryland, 373 U.S. 83 (1963) and the Jencks Act, 18 U.S.C. § 3500. Finally, Respondent does not discuss much less defend the Tenth Circuit's holding that Petitioner "waived" his Jencks Act rights by not filing a pre-trial motion for the material now at issue.

Instead, the Opposition (1) dwells on a loan transaction which gave rise to a secondary, footnoted point in the Petition (pp. 20-21, n.6) concerning the Brady and Jencks Act issues*, and (2) attempts to leave the impression that the violations of Brady and the Jencks Act did not affect the result of the trial. That position is untenable.

The suppressed Report was one of a BNDD interview with a witness whom

*/ The Respondent did not, however, answer Petitioner's argument as to why suppression of the fact that the loan transaction was brought up at the initial interview between the informant and agents of the Bureau of Narcotics and Dangerous Drugs ("BNDD") should have been disclosed and made known to the jury. See Petition, p. 21, n.6, last paragraph.

the Government acknowledges (Br. in Opp. 3-4) was one of its two principal prosecution witnesses. The suppressed material went directly to his credibility. In that circumstance, the improper suppression "unquestionably . . . would require reversal of Petitioner's conviction". DeMarco v. United States, 415 U.S. 449 (1974); Giglio v. United States, 405 U.S. 150 (1972). Moreover, since there is here a violation of statute (viz, the Jencks Act) and also for reasons stated in the Petition (pages 23-28), this case must be treated as one in which a specific request for Brady materials was made, such an argument is not open to the prosecution: "the [prosecutor's] failure to make any response is seldom, if ever, excusable." United States v. Agurs, 427 U.S. 97, 106 (1976). Neither the District Court nor the Tenth Circuit relied upon the reasoning now urged in the Brief in Opposition.

The Government's contention (Br. in Opp. 7) that "even without knowledge of the interview report petitioner

was able . . . to make the same arguments at trial about . . . the possibility of Nocenti's having framed him that he now presents" is unfounded. Although Petitioner attempted to present that defense, he not only was denied access to information supportive of it, but the witness was permitted to leave the false impression with the jury that the evidence did not exist, and hence that the defense lacked merit. See Petition pp. 8-10, 18-25.

Petitioner was entitled to have the jury weigh the evidence and the credibility of the critical witnesses presenting it. That the prosecution would have succeeded in proving its case beyond a reasonable doubt had Nocenti been discredited is unlikely. The invitation of Respondent to the Court to speculate that the testimony of a lead prosecution witness was superfluous must be rejected as improbable and as impinging upon the functions of the jury. The closeness of this case, contrary to the present contentions of Respondent, is demonstrated, inter alia, by the lengthy

deliberations of the jury (taking a full day in a trial with only one defendant) and the fact that Petitioner was acquitted upon the substantive counts of the Indictment.

CONCLUSION

For the reasons set forth above and in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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